IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3247 of 1999

With

SPECIAL CIVIL APPLICATION No. 3574 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

and

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MANIBHAI PRABHUSAS PATEL & Another.

Versus

LK KOOLWAL, DESIGNATED AUTHORITY.

Appearance:

MR SN SOPARKAR, with Mr. Tushan Hemani
for Petitioners.
MR MANISH R BHATT, Sr. Standing Counsel for
Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 02/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

The petitioners, in these petitions under Article 226 of the Constitution of India, have challenged the orders dated 25.2.1999 and 23.2.1999 respectively passed by the Designated Authority rejecting the petitioners' declaration filed under Section 89 of the Finance (No.2) Act, 1998. The said declaration was filed by the petitioners under Kar Vivad Samadhan Scheme, 1998 (hereinafter referred to as "KVS Scheme").

2. The brief facts giving rise to filing of Special Civil Application No. 3247 of 1999 are, that during the assessment year 1982-83 to 1988-89, the petitioner was a partner in the firm of M/s. Premier Paper Industries, M/s. Pioneer Builders and M/s. Swadeshi Industries. The petitioner had filed his return of income for the respective years declaring his share income from the firms on the basis of returns of income filed by the firms, and as per the allocation of his share of property according to the said returns of income of the firm. The said partnership firms had approached the Settlement Commission for settlement of their cases under Section 245-C of the Act for assessment years 1982-83 to 1988-89.

3. The Settlement Commission had passed the order under Section 245-D(4) of the Act on 28-3-1995 computing the income of the firms and allocating the same in the hands of the partners. As a result of the share income so allocated towards the petitioner from the partnership firms the income had increased. The Assessing Officer thereafter passed order under Section 155 of the Act on 24-12-1998 rectifying the assessment orders made earlier for different assessment years and as a result of these orders passed under Section 155 of the Act, the petitioner was liable to pay taxes for assessment years 1982-83 to 1988-89. Being aggrieved by these orders, the petitioner preferred appeals under Section 246-A of the Act on 29-1-1999 for the respective years and the said appeals were pending before the first appellate authority. The petitioner had filed a declaration in Form No. 1-A of the KVS Scheme for assessment years 1982-83 to 1988-89 on the same day, that is 29.1.1999. However, the designated authority has rejected the said declarations on the ground mentioned the order passed on 25.2.1999 and the said order is challenged in this petition before this Court.

4. So far as Special Civil Application No. 3574 of 1999 is concerned, more or less the same challenge is there and the assessment years involved are 1991-92 and 1992-93. In this case, the firm had approached the Settlement Commission for settlement of taxes. The Settlement Commission had passed the order on 29.9.1997 under Section 245-D(4) and thereafter consequential order was passed under Section 155 of the Act on 18-9-1998 which was challenged in revision petitions under Section 264 of the Act on 21-12-1998 and the declaration was filed for settlement of disputes on 29-12-1998 for assessment years 1990-91 and 1991-92 which was rejected by the designated authority on 23-2-1999 and the said order is under challenge in this petition before this Court.

5. Both these petitions were admitted by this Court on 7.5.1999 and 11.5.1999. After service of the Rule, an affidavit-in-reply was filed on behalf of respondents in both the cases and petitions were opposed on the ground mentioned in the said affidavit. Since the common issue is involved in both the petitions, both the petitions were heard together and are disposed of by this common judgment.

6. Heard Mr. S.N. Soparkar, learned Senior Advocate appearing for the petitioners and Mr. B.B. Naik, learned Standing Counsel appearing for the respondents. Before we deal with the respective arguments canvassed by both the parties, it is important to point out here in relation to Special Civil Application No. 3247 of 1999 that the declaration filed by the petitioner was rejected by the designated authority on the following three grounds :

i. The income in your case has been determined pursuant to an order u/s. 245D(4) of the I.T. Act.

ii. Clause (b) of sub-section (i) of Section 95 of Finance (No.2) Act 1998 holds that the provisions of the Kar Vivad Samadhan Scheme does not apply in such cases.

iii. Your appeal before CITA (A) is not a valid appeal u/s. 246(A).

Similarly, in another petition, the declaration was rejected on the ground that in view of the provisions of Section 95(1)(b) of the Finance (No.2) Act, 1998, the

petitioner's case cannot be covered under the KVSS, 1998. The main argument canvassed by Mr. Soparkar is that the order under Section 245D(4) was passed in the case of the firm and there was no order passed by the Settlement Commission in the case of the petitioner who was a partner in the said three firms. He has, therefore, submitted that the embargo which is contained in Section 95(1)(b) is not applicable to the facts of the petitioner's case. In support of his contentions, he submitted that the firm and partner, both are different entities under the Income Tax Act. Section 2(31) of the Act defines "person" which, inter alia, includes 'individual' as well as 'firm'. In support of his contention, he has relied on the decision of the Supreme Court in CIT Vs. A.W. Figgies and Company and Others - 24 ITR 405; Bist And Sons vs. CIT, New Delhi - 116 ITR 131; and The State of Punjab vs. Jullundur Vegetables Syndicate - (1966) 17 STC 326, wherein it is held that the 'firm' and the 'partner' are separate legal entities. Relying on these decisions, he has contended that the order passed by the Settlement Commission in the case of the firm cannot ipso facto or automatically lead to a conclusion that the said order is also passed in the case of the partner.

7. Mr. Soparkar, has further submitted that Section 95 of the Act stipulates that KVSS 1998, does not apply in certain cases. Section 95(1)(b) reads as under:

95. The provisions of this Scheme shall not apply___

(i) in respect of tax arrear under any direct tax enactment,___

(a) xxx xxx xxx xxx

(b) in a case where an order has been passed by the Settlement Commission under sub-section (4) of section 245D of the Income-tax Act or sub-section (4) of section 22D of Wealth-tax Act, as the case may be, for any assessment year, to any tax arrear in respect of such assessment year under such direct tax enactment;

(c) xxx xxx xxx xxx

On the basis of provisions contained in Section 95(1)(b) of the Act, he submitted that since no order was passed

by the Settlement Commission in the petitioner's case, the said Section would not apply to the petitioners and the petitioners can get the benefit of KVS Scheme. He has further submitted that pursuant to the order passed by the Settlement Commission an order under Section 155 of the Act was passed by the Assessing Officer in the case of the petitioner and since the said order was challenged in appeal before the first appellate authority, both the conditions namely, there was a tax arrear and that the proceedings were challenged in appeal before the appellate authority were satisfied and hence the petitioner was entitled to avail the benefit granted under KVS Scheme.

8. Mr. Soparkar, learned Senior Counsel has further submitted that once the order is challenged in appeal it is not open for the designated authority to go into the merits of the matter and reject the declaration on the ground that there was no tax dispute raised by the assessee and dispute raised was only frivolous or baseless. In support of his contention, he relied on the decision of this Court in the case of Gufic Pharma Ltd. vs. J.G. Arora - 238 ITR 835, wherein it is held as under :

> "That it is not the condition for operation of the Kar Vivad Samadhan Scheme that the appeal, revision or reference should have come before March 31, 1998, or before the coming into force of the Scheme. It was not intended to curtail the right of any aggrieved party to prosecute his remedies under law. The facts clearly showed the existence of an issue as to the jurisdiction of the Assessing Officer to make an order under section 154 in respect of a claim to deduction that had been the subject-matter of appeal before the Commissioner of Income-tax (Appeals) and which already stood disposed of, and a bona fide dispute as to the levy of additional tax as a part of the demand created as a result of the order under section 154. The assessee by agreeing to withdraw the deduction under section 80-I could not be deemed to have agreed to charge of additional tax under section 143 (1A). It was also not the case that the revision had not come into existence within the period of limitation, so as to suggest that the assessee had waived his right to challenge that order. The mere fact that the assessee had not filed a revision prior to the coming into force of the Kar Vivad Samadhan Scheme, in the facts of the case, could

not be held against the assessee. If he can legitimately act within the precincts of the statute for pursuing a bona fide dispute, he can also claim the benefit of the scheme promulgated by Parliament when necessary conditions for availing of such benefit have been shown to exist. As on the date of the declaration, he had tax arrears which stood determined prior to March 31, 1998, and he had also a dispute pending before the Commissioner of Income-tax by way of revision under section 264 which could not have been ignored by him. The assessee having made the declaration, fulfilling both the conditions as on the date of the declaration, could not have been denied the benefits of the Scheme."

Mr. Soparkar has further relied on the decision of Kerala High Court in the case of Lukkose John Thoppil vs. Commissioner of Income-Tax, 242 ITR 1, wherein it is held as under :

"In the instant case, the revision petitions were filed on October 28, 1998. The declarations were filed on November 2, 1998. Thus, it could not be said that the revision petitions were not pending on the date of filing of the declarations. A perusal of the revision petitions would show that the petitioners had taken the contention that calculation of the interest was not correct. The request was not merely to waive the interest. Hence, it could not be said that the revision petitions were not maintainable. The declarations were valid and had to be considered."

Mr. Soparkar has, thereafter relied on the several circulars issued by the Central Board of Direct Taxes clarifying the controversial issues referred to therein and has made submission that the petitioner was entitled to the benefit under KVS Scheme.

9. Mr. B.B. Naik, learned Standing Counsel appearing for the respondent has vehemently argued before us that Section 95(1)(b) of the Act is very clear and order passed by the Settlement Commission under Section 245D(4) in the case of the firm equally applies to the case of the petitioner as what is to be done in the partner's case is only to pass an consequential order giving effect to the order of the Settlement Commission and hence within the KVS Scheme itself and looking to the

entire Scheme of the Act which is in force at the relevant time covering assessment years in question. Section 155 (1), so far as it relates to the allocation and computation of the share income from the partnership firm is required to be read with Section 95(1)(b) of the Act and any order passed by the Settlement Commission under Section 245-D(4) of the Act in the case of the firm would equally apply with full force to the case of the partners. If the scheme is not applied to the firm in whose case the order is passed under Section 245-D (4) of the Act, and similarly when the effect is given in the case of the partner pursuant to that order, the assessee cannot avail the benefit of KVS Scheme. In support of his argument,he has relied on the decision of this Court in the case of Prabhat Solvent Extraction Industries Ltd. v. S.S. Khan, 238 ITR 510, wherein it is held that for the purpose of Kar Vivad Samadhan Scheme the requirement is not that the assessment should be made directly as a consequence of search relating to the assessment year in question. It is sufficient if the determination of assessment for the relevant assessment year is on the basis of material information and opinions formed relating to the practice followed by the assessee in the matter of maintaining accounts that provides nexus between the search and the determination of tax. He submitted, that here in the petitioner's case there is direct nexus between the order passed by the Settlement Commission under Section 245-D(4) of the Act in the case of the firm, and the consequential order giving effect to the order of the Settlement Commission, passed by the Assessing Officer computing the revised share income of the said firms and hence for all purposes the order so passed by the Assessing Officer can be considered as the order passed by the Settlement Commission in the case of the partner so far as share income is concerned.

10. Mr. Naik has further submitted that so far as assessment years 1982-83 to 1988-89 are concerned, there was no existing demand as on 31.3.1998 as all assessments were completed. Neither any tax, penalty, or interest was outstanding and hence it cannot be said that there was any tax arrear as on that date. The demand was raised only as a result of the order passed by the Settlement Commission under Section 245-D (4) of the Act in the case of the firm and consequently the petitioner was made liable to pay the tax on the enhanced share income from the partnership firms. There was no other income which was disturbed in the order passed under Section 155 of the Act by the Assessing Officer and so far as the share income from the firm is concerned, they cannot file any declaration before the designated

authority. He has further submitted that if there is any grievance with regard to any other income, that is other than the share income of the partnership firm the assessee can file a declaration before the designated authority. He has therefore submitted that income can be bifurcated and only with regard to the disputed tax liability the declaration can be filed and for that purpose, Mr. Naik has relied on the decision of the Bombay High Court in the case of Killick Nixson Ltd. vs. Deputy Commissioner of Income-Tax and Another, 248 ITR 17 (Bombay). In this case, there were additions on 7 heads, out of this, three additions were confirmed and remaining four were set aside with a direction to the Assessing Officer to frame the reassessment de novo. The assessee preferred second appeal before the Tribunal challenging the additions which are confirmed in the first appeal and thereafter a declaration was filed by the assessee for the entire additions. The designated authority accepted the declaration only with regard to the three additions in respect of which the appeal was pending before the ITAT. Thereafter, the Assessing Officer has taken on hand the reframing of the assessment in respect of four additions and the said action was challenged before the Bombay High Court, wherein the Court has taken the view that if in a given case, the income is determined by taking into account all the heads then the determination of the assessed income would cover all the heads, but if the Assessing Officer has not adjudicated by the cut-off date on all the heads of income and tax has been demanded only on part determination, then the Kar Vivad Samadhan Scheme contemplates payment of tax on the part of the total assessed income. In these circumstances, the Court has taken the view that the Assessing Officer was authorised and empowered to proceed under Section 142(1) of the Income-tax Act in respect of assessment year 1992-93 after the designated authority passed an order on January 19, 1999 under the Kar Vivad Samadhan Scheme determining the total income of the assessee-petitioner.

11. Mr. Naik, thereafter, drew our attention to Section 182 of the Act, as it was in force at the relevant time, which reads as under :

"182. Assessment of registered firms.___

(1) Notwithstanding anything contained in sections 143 and 144 and subject to the provisions of sub-section (3), in the case of a registered firm, after assessing the total income of the firm,__

(i) the income-tax payable by the firm itself shall be determined; and

(ii) the share of each partner in the income of the firm shall be included in his total income and assessed to tax accordingly."

He has submitted that the Assessing Officer is bound to determine the share of partner in the income of the firm and the same shall be included in the total income of the partner and assessed to tax accordingly. Even under Section 182(4) of the Act, the firm is entitled to retain upto 30 per cent of the income allocated by the partner towards the tax liability of the partner. On the basis of these, it is strongly contended by Mr. Naik that the order passed by the Settlement Commission in the case of the firm under Section 245-D(4) of the Act has direct bearing on the share income allocated to the partner, and it cannot be said that there was any dispute with regard to the said income. He has further invited our attention to Section 247, as it stood at the relevant time, to contend that a partner cannot agitate in any appeal against the assessment order passed in the case of the firm determining his own total income or loss. It is therefore submitted by him that the designated authority is justified in rejecting the declaration filed by the petitioners on the ground that the scheme is not applicable to the petitioners as the orders were passed by the Settlement Commission under Section 245-D(4) of the Act in the case of the firm.

12. In Rejoinder, Mr. Soparkar, learned Senior Counsel has submitted that the authorities cited by Mr. Naik are not relevant and they are not applicable to the issue involved in the present petition. He has therefore submitted that the designated authority was not justified in rejecting the declaration of the petitioners.

13. We have at length dealt with the arguments canvassed by both the parties. However, we are not inclined to go into the merits and demerits of all these contentions which were raised before us. We confine ourselves only to ground No.2 raised by the designated authority while rejecting the declaration filed by the petitioner. In our view, Section 95(1)(b) of the Act squarely applies to the facts of the petitioners' case as the said Section refers to the case where an order has been passed by the Settlement Commission under sub-section (4) of Section 245-D of the Act. Here, in

the present case, the order was passed by the Settlement Commission in the case of the partnership firms and consequential effect was given to petitioners' case and the petitioners were partners in the said firm. The said proceedings, therefore, flow from the proceedings of the firm. In our view, there is an inbuilt mechanism in the Act, Looking to the entire scheme of the Act as well as the KVS Scheme, we are of our considered opinion that Section 155(1) is required to be read within Section 95(1)(d) of the Act, if the firm is prohibited from approaching the designated authority for settlement of its tax disputes as those disputes were already resolved by Settlement Commission, the partners are equally prohibited from approaching the designated authority qua the share income from the said firm is concerned. We make it clear, that simply because the share income is included in the case of the petitioners, it cannot be said that the petitioners cannot approach the Designated Authority qua the other income is concerned. The embargo is only with regard to the share income from the firm, in which case the order under Section 245-D(4) is passed and it does not preclude the petitioners from approaching the designated authority under KVS Scheme for settlement of their other disputes. Thus, certain hypothetical examples given by Mr. Soparkar, ld. counsel for the petitioners on this count, have not impressed us much. We found that the consequential order passed by the Assessing Officer contained variance only with regard to the share income from the firm and that there was no other variance, vis-a-vis the other income of the petitioners is concerned. It was not canvassed by the petitioners that the allocation or computation made by the Assessing Officer with regard to the share income of the firm was not correct. In our view, the appeal/Revision filed by the petitioners against the order passed under Section 155 of the Act is not considered to be a valid appeal or Revision in the eye of law as there was no grievance as such against that order. It is true that the designated authority cannot consider the merits of that appeal, but it is equally true that only for the purposes of availing the benefit under KVS Scheme, frivolous appeal/Revision was filed though there was no occasion to file such appeal/Revision. In this view of the matter, the designated authority is certainly justified in rejecting the impugned declaration.

14. In light of the above discussion, and keeping in mind the view, which we are taking, it is not necessary for us to go into the other aspects of the matter. We, therefore, confirm the orders passed by the designated authority, rejecting the declaration filed by the

petitioners of both the cases.

15. In the result, both these Special Civil Applications are rejected. Rule is discharged with no order as to costs.

rmr. [M.S. Shah, J.] [K.A. Puj, J.]